CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 548. 239.

THE SUN PRINTING AND PUBLISHING ASSOCIATION

vs.

CHARLES WILLIAM EDWARDS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 14, 1910.

(18,870.)

21761

(18,870.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 642.

THE SUN PRINTING AND PUBLISHING ASSOCIATION

vs.

CHARLES WILLIAM EDWARDS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States Circuit Court of Appeals, Second Circuit.

THE SUN PRINTING AND PUBLISHING ASSOCIATION, Plaintiff in Error,
vs.
CHARLES WILLIAM EDWARDS, Defendant in Error.

This cause comes here upon a writ of error to review a judgment of the circuit court, southern district of New York entered upon the verdict of a jury in favor of defendant in error who was plaintiff below. Upon examination of the record it appears that, in addition to various questions as to the merits of the controversy which are presented by the assignments of error, the jurisdiction of the circuit court is in issue. Under sections 5 and 6 of the act of March 3, 1891 writs of error in such cases are to be taken direct to the Supreme Court and the grant of appellate jurisdiction to the circuit courts of appeal does not include such cases.

In accordance therefore, with the practice indicated in Cincinnati, Hamilton & D. Co. *v.* Thiebaud, 177 U. S. 615, and Am. Sugar Co. *vs.* New Orleans 181 U. S. 277, and followed by this court in U. S. *vs.* Lee Yen Tai, 113 F. R. 465, this court elects to reserve judgment upon the other questions and to certify the question of jurisdiction to the Supreme Court.

2 *Statement of Facts.*

The facts out of which the question of jurisdiction arises are as follows:

The action is for breach of contract of employment. The complaint avers and the answer admits that defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the southern district of New York. The complaint further avers and the answer admits that "plaintiff is a resident of the State of Delaware." Upon the trial the plaintiff testified "I started in the printing business about thirty years ago. * * * I have been on the New York Tribune, on the World, the Philadelphia Record and the American Press Association. * * * I had charge of the Morning News Wilmington, Delaware. * * * In this city [New York] I worked on the New York Tribune, on the Sun, on the World, and in the American Press Association. * * * Just prior to my going to work upon the New York Sun [under the contract in suit] I was the publisher and business manager of the Evening Journal of Wilmington, Delaware, and president of the company. * * * [After my discharge from the employ of the Sun] I finally secured a place with the New Haven Palladium, and I was there a while. * * * One of the reasons I left the New Haven Palladium was it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware."

There was no other testimony in any way bearing upon plaintiff's residence or citizenship.

3 The jurisdiction of the circuit court was not questioned by defendant in the court below, and the assignments of error do not present any such question.

Question Certified.

Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court is:

"Had the circuit court jurisdiction of the controversy between plaintiff and defendant?"

In accordance with the provisions of section 6 of the act of March 31, 1891, establishing courts of appeal, etc., the foregoing question of law is by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

March 11th, 1903.

E. HENRY LACOMBE,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge.

4 [Endorsed:] United States circuit court of appeals, second circuit. The Sun Printing and Publishing Association, pl'ff in error, *vs.* Charles William Edwards, def't in error. Certificate to Supreme Court. United States circuit court of appeals, second circuit. Filed Mar. 12 1903. William Parkin, clerk.

5 UNITED STATES OF AMERICA, }
Southern District of New York. }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit do hereby certicy that the foregoing certificate was filed and entered of record in my office on the 12th day of March, 1903, and as directed by the judges of said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

New York, March 13, 1903.

[Seal United States Circuit Court of Appeals, Second Circuit]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

6 [Endorsed:] United States circuit court of appeals, second circuit. Sun Printing & Publishing Ass'n *v.* Chas. W. Edwards. Certificate.

Endorsed on cover: (Certificate.) File No. 18,870. U. S. C. C. of appeals, 2nd circuit. Term No. 642. The Sun Printing and Publishing Association *vs.* Charles William Edwards. Filed March 19, 1903.

21764

Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 239.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Plaintiff in Error,

AGAINST

CHARLES WILLIAM EDWARDS,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This case comes here on a certificate from the United States Circuit Court of Appeals for the Second Circuit, certifying to the Supreme Court for its determination the following question:

"Had the Circuit Court jurisdiction of the controversy between plaintiff and defendant?"

See *Certificate*, p. 2, fol. 3.

The only record before this Court is that contained in the printed Certificate, which contains the following statement:

"This cause comes here (the United States Circuit Court of Appeals, Second Circuit) upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error who was plain-

tiff below. Upon examination of the record it appears that, in addition to various questions as to the merits of the controversy which are presented by the assignments of error, the jurisdiction of the Circuit Court is in issue. * * *

Statement of Facts.

The facts out of which the question of jurisdiction arises are as follows:

The action is for breach of contract of employment. The complaint avers and the answer admits that defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Southern District of New York. The complaint further avers and the answer admits that 'plaintiff is a resident of the State of Delaware.' Upon the trial the plaintiff testified: 'I started in the printing business about thirty years ago. * * * I have been on the *New York Tribune*, on the *World*, the *Philadelphia Record* and the American Press Association. * * * I had charge of the *Morning News*, Wilmington, Delaware. * * * In this city (New York) I worked on the *New York Tribune*, on the *Sun*, on the *World*, and in the American Press Association. * * * Just prior to my going to work upon the *New York Sun* (under the contract in suit) I was the publisher and business manager of the *Evening Journal* of Wilmington, Delaware, and president of the company. * * * (After my discharge from the employ of the *Sun*) I finally secured a place with the *New Haven Palladium*, and I was there a while. * * * One of the reasons I left the *New Haven Palladium* was it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware.'

There was no other testimony in any way bearing upon plaintiff's residence or citizenship.

The jurisdiction of the Circuit Court was not questioned by defendant in the Court below, and the assignments of error do not present any such question."

Certificate, pp. 1 and 2, fols. 2 and 3.

The Circuit Court of Appeals has elected to reserve judgment upon the other questions and to certify the question of jurisdiction to the Supreme Court, stating that it does so in accordance with the practice indicated in *Cincinnati, Hamilton & D. Co.* v. *Thiebaud*, 177 U. S., 615, and *Am. Sugar Co.* v. *New Orleans*, 181 U. S., 277, and followed by the United States Circuit Court of Appeals in *United States* v. *Lee Yen Tai*, 113 F. R., 465.

In *American Sugar Refining Co.* v. *New Orleans*, reported in 181 U. S., at page 282, the Supreme Court in its opinion, by Mr. Chief Justice Fuller, said:

"Undoubtedly where the jurisdiction of the Circuit Court depends solely on diverse citizenship and it turns out that the case involves the construction or application of the Constitution of the United States; or the constitutionality of a law of the United States or the validity or construction of a treaty is drawn in question; or the constitution or law of a State is claimed to be in contravention of the Constitution of the United States; the Circuit Court of Appeals may certify the constitutional or treaty question to this Court, and proceed as thereupon advised; or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the Circuit Court of Appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction."

First Point.

The only ground of jurisdiction in the Circuit Court is the assumed diverse citizenship of the parties.

The certificate shows that the case did not arise under the Constitution or laws or treaties of the United States.

The certificate states:

"The action is for breach of contract of employment. The complaint avers and the answer admits that defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Southern District of New York. The complaint further avers and the answer admits that 'plaintiff is a resident of the State of Delaware.'"

And then, after quoting from the plaintiff's testimony, the Circuit Court of Appeals says:

"There was no other testimony in any way bearing upon plaintiff's residence or citizenship."

Certificate, pp. 1-2, fols. 2-3.

Second Point.

The complaint contains no averment that the plaintiff, Charles William Edwards, is a citizen of the State of Delaware, and its simple averment that "plaintiff is a resident of the State of Delaware" is insufficient to give the Circuit Court jurisdiction.

"Citizenship" and "residence" are not synonymous terms.

Opinionof the Supreme Court by Mr. Justice Grier in

Parker et al. v. *Overman*, 18 Howard p. 141, December, 1855.

"Citizenship and residence, as often declared by this Court, are not synonymous terms. (*Parker et al. Overman*, 18 How., 137)."

Robertson v. *Cease*, 97 U. S., p. 648, October, 1878.

That there must be an explicit averment of citizenship has been the settled law ever since 1798, when this Court decided the case of *Bingham* v. *Cabot*, 3 Dallas, 382.

There the reporter says:

"This action came again before the Court, on a writ of error; and an objection was taken to the record, that it was not stated, and did not appear in any part of the process and pleadings, that the plaintiffs below, and the defendant, were citizens of different States, so as to give jurisdiction to the Federal Court. * * *

Lee, Attorney-General, contended for the plaintiff in error, 'that there was not a sufficient allegation on the record, of the citizenship of the parties, to sustain the jurisdiction of the Circuit Court, which is a limited jurisdiction. Though the Constitution declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States" (Art. 4, f. 2), it contemplates, in the judicial article, the distinction between citizens of different States. * * *

In the present case, neither the plaintiffs, generally, nor any individual of them, nor the defendants will be found expressly designated as aliens, or as citizens of any other place, or State, than that in which the suit was brought. * * *

The Court were clearly of opinion that it was necessary to set forth the citizenship (or alienage, where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the Circuit Court; and that the record, in the present case, was in that respect defective."

In 1803 in the case of *Abercrombie* v. *Dupuis and another*, 1 Cranch, 343

"It was assigned for error that the Circuit Court had not jurisdiction of the cause, because it does not appear upon the record that either of the parties is an alien, nor that the parties are *citizens* of different States. And for this error the judgment was reversed without argument.

The Court said that the question had been decided, after full argument, in the case of *Bingham* v. *Cabot*, 3 Dall., 383, and they did not think proper to overrule that case."

In *Wood* v. *Wagnon* (February Term, 1804), 2 Cranch, 9:

"The judgment was reversed, because it did not appear upon the record that the Circuit Court had jurisdiction of the case.

The proceedings stated, that 'the petition of John Peter Wagnon, *a citizen of the State of Pennsylvania*, showeth,

'That James Wood, *of the State of Georgia*,' &c.

The objection taken was, that it did not appear that the plaintiff and defendant were citizens of different States, and on that ground the judgment was reversed, upon the authority of *Bingham* v. *Cabot et al.*, 3 Dall., 382."

In *Capron* v. *Van Noorden*, 2 Cranch, 126, the judgment was reversed, because the declaration did not state the citizenship or the alienage of the plaintiff in the Circuit Court.

The foregoing decisions were all cited by Mr. Chief Justice Marshall, in delivering the opinion of this Court, in *Brown* v. *Keene* (January Term, 1834), 8 Peters, 112, where he said:

"The same principle has been constantly recognized in this Court."

And where, in an earlier part of the opinion, he said:

"The decisions of this Court require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. *It is not sufficient that jurisdiction may be inferred argumentatively from its averments.*"

Idem, p. 115.

The essential jurisdictional fact should be averred or alleged in the bill of complaint.

In *Hornthall* v. *The Collector* (December, 1869), 9 Wallace, 560, Mr. Justice Clifford, in delivering the opinion of the Court, said:

"Citizenship of the parties to a suit, where it is the foundation of jurisdiction in the Federal courts,

must be distinctly averred, so as to show not only that they are citizens of different States but also that one of them is a citizen of the State where the suit is brought. Express allegation of the facts material to give jurisdiction is necessary, because such courts are courts of special and not of general jurisdiction, and consequently there is no presumption in favor of their jurisdiction where the facts requisite to show it do not appear in the record."

Idem, p. 565.

There is no presumption in favor of jurisdiction in the Circuit Court, but the presumption is against jurisdiction. This is shown by the case of *Robertson* v. *Cease*, 97 U. S., 646, where Mr. Justice Harlan, in delivering the opinion of the Court, said:

"As the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, *the presumption now*, as well as before the adoption of the Fourteenth Amendment, *is, that a cause is without its jurisdiction unless the contrary affirmatively appears.*"

Idem, p. 649.

This Court, in its opinion by Mr. Justice Harlan, in *Grace* v. *American Central Insurance Company*, 109 U. S., at page 283, said:

"As the jurisdiction of the Circuit Court is limited, in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears (*Turner* v. *Bank of North America*, 4 Dall., 8; *Ex Parte Smith*, 94 U. S., 455; *Robertson* v. *Cease*, 97 U. S., 646).

"In cases of which the Circuit Courts may take cognizance only by reason of the citizenship of the parties, this Court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits on appeal or writ of error, where the record does not affirmatively show jurisdiction in the Court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption, in every stage of the

cause, is, that it is without their jurisdiction unless the contrary appears from the record (*Grace* vs. *American Insurance Co.*, 109 U. S., 278, 283; *Robertson* vs. *Cease*, 97 U. S., 646 (648)."

Börs vs. *Preston*, 111 U. S., p. 255.

In the case of *Everhart* v. *Huntsville College*, 120 U. S., 223 (decided January 31, 1887), the headnotes read:

" *An averment that the complainant in a bill of equity 'resides' in a State, is not an averment that he is a citizen of the State, so as to give a Circuit Court of the United States jurisdiction over the subject matter by reason of citizenship of the parties.*"

" When the jurisdiction of a Circuit Court depends upon the citizenship of the parties, and that court takes jurisdiction and renders judgment, and the record in this court in error or on appeal fails to show the requisite citizenship, the judgment will be reversed and the case remanded by this Court on its own motion, and the party in default adjudged to pay costs here."

There Mr. Chief Justice Waite, in delivering the opinion of the Court, said:

"On looking into the record we find no sufficient evidence of the jurisdiction of the Circuit Court, which depends alone on the citizenship of the parties. It is stated in the original bill that Everhart is a resident of Wisconsin, and the same fact is also shown by the testimony, but this, as it has often been held, is not enough. *An averment of residence is not the equivalent of an averment of citizenship for the purposes of jurisdiction in the courts of the United States.* According to the pleadings the Huntsville Female Academy is an Alabama corporation, and the other defendants are residents of either Alabama or Tennessee. The decree dismissing both the original and cross bills is reversed, because the record fails to show the jurisdiction of the Circuit Court, but as the fault rests alone on Everhart, the complainant in the original bill, whose duty it was

to put on record the facts necessary to show the jurisdiction, the reversal will be at his costs in this court. This whole subject has already been considered twice during the present term; once in *Continental Ins. Co.* vs. *Rhoads*, 119 U. S., 237, and again in *Peper* v. *Fordyce*, 119 U. S., 469. The reasons for our judgment sufficiently appear in the opinions delivered in those cases."

Idem, p. 224.

In *Menard* v. *Goggan* (decided April 11th, 1887), 121 U. S., 253, the head note reads:

"It is again held that when the jurisdiction of a Circuit Court depends alone on citizenship, an averment that the plaintiff is a 'resident' in one State named, and that the defendant is a 'resident' in another State named, confers no jurisdiction; and a judgment rendered below in such case in favor of the defendant, and brought up in error by the plaintiff, is reversed with costs in this court against the plaintiff in error."

In *Denny* v. *Pironi*, 141 U. S., at p. 123, (May 25, 1891), Mr. Justice Brown, in delivering the opinion of the Court, said:

"That an averment of residence is not the equivalent of an averment of citizenship, and is insufficient to give the Circuit Court jurisdiction, has been settled in a multitude of cases in this Court: *Parker* v. *Overman*, 18 How., 137; *Robertson* v. *Cease*, 97 U. S., 646; *Everhart* v. *Huntsville College*, 120 U. S., 223; *Menard* v. *Goggan*, 121 U. S., 253; and in case of a defective averment in this particular the judgment will be reversed by this Court upon its own motion, and the case remanded; *Peper* v. *Fordyce*, 119 U. S., 469; *Everhart* v. *Huntsville College*, 120 U. S., 223; *Menard* v. *Goggan*, 121 U. S., 253."

Third Point.

The record fails to disclose diverse citizenship in the parties.

The general rule is well stated in *Ex parte Smith* (October, 1876), 94 U. S., 455, where the head note reads:

"There are no presumptions in favor of the jurisdiction of the courts of the United States; but the facts upon which it rests must, in some form, appear in the record of all suits prosecuted before them."

The defect in the averment of the complaint was not cured at the trial, for the plaintiff did not testify as to his citizenship. His testimony as quoted in the Certificate, page 1, reads as follows:

"I started in the printing business about thirty years ago. * * * I have been on the *New York Tribune*, on the *World*, the *Philadelphia Record* and the American Press Association. * * * I had charge of the *Morning News*, Wilmington, Delaware. * * * In this city (New York) I worked on the *New York Tribune*, on the *Sun*, on the *World*, and in the American Press Association. * * * Just prior to my going to work upon the *New York Sun* (under the contract in suit) I was the publisher and business manager of the *Evening Journal* of Wilmington, Delaware, and president of the company. * * * (After my discharge from the employ of the *Sun*) I finally secured a place with the *New Haven Palladium*, and I was there a while. * * * One of the reasons I left the *New Haven Palladium* was it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware."

This testimony throws no light, whatsoever, upon the citizenship of the plaintiff. It merely shows that he had worked on New York newspapers, on a Philadelphia newspaper, on a Delaware news-

paper, and, after his discharge from the employ of the *Sun*, on the *New Haven Palladium*, and that when he left the *New Haven Palladium*, he lived in Delaware and had to go back and forth, and that his family were over in Delaware. So, the plaintiff may well have been at the time of the commencement of the action a citizen of the State of New York, for he says, "in this City (New York), I worked on the *New York Tribune*, on the *Sun*, on the *World* and in the American Press Association." That his family lived in Delaware, and that he, the plaintiff, lived in Delaware, furnishes no proof that plaintiff was a citizen of that State.

In *Grace* vs. *American Central Insurance Co.*, decided November 19, 1883, 109 U. S., 278, the third and fourth headnotes read:

"3. The doctrine reaffirmed, that when jurisdiction of the circuit court depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, must be distinctly and positively averred in the pleadings, or appear affirmatively and with equal distinctness in other parts of the record. An averment that parties reside, or that a firm does business, in a particular State, or that a firm is 'of' that State, is not sufficient to show citizenship in such State.

4. Where the record does not show a case within the jurisdiction of a circuit court, this court will take notice of that fact, although no question as to jurisdiction had been raised by the parties."

In that case Mr. Justice Harlan, in delivering the opinion of the Court, said:

"*The record in this case presents a question of jurisdiction which, although not raised by either party in the court below or in this court, we do not feel at liberty to pass without notice* (*Sullivan* v. *Fulton Steamboat Co.*, 6 Wheat., 450; *Jackson* v. *Ashton*, 8 Pet., 148). As the jurisdiction of the circuit court is limited, in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears (*Turner* v. *Bank*

of North America, 4 Dall., 8; *Ex Parte Smith*, 94 U. S., 455; *Robertson* v. *Cease*, 97 U. S., 646). In the last case it is said that 'where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record' (*Railway Co.* v. *Ramsay*, 22 Wall., 322; *Briges* v. *Sperry*, 95 U. S., 401). In *Brown* v. *Keene*, 8 Pet., 112, it is declared not to be sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings; that the averments should be positive.

* * * * * *

The record does not satisfactorily show the citizenship of the parties. The complaint filed in the State court shows that the firm of Wm. R. Grace & Co., composed of Wm. R. Grace, Michael P. Grace, and Charles R. Flint, is doing business in New York, and that Wm. R. Grace and Charles R. Flint are residents of that State. The petition for the removal of the cause shows that the defendant is a corporation of the State of Missouri; that Wm. R. Grace and Charles R. Flint reside in New York; and that Michael P. Grace is a resident of some State or country unknown to defendant, but other than the State of Missouri. The record, however, fails to show of what State the plaintiffs are citizens. *They may be doing business in and have a residence in New York, without necessarily being citizens of that State.* They are not shown to be citizens of some State other than Missouri."

Idem, pp. 283-284.

The record must show affirmatively and with distinctness that at the time of the commencement of the action a diversity of citizenship existed.

"We are of opinion that the inquiry is to be determined as of the date when the suit is commenced. Jurisdiction vests then and cannot be divested by subsequent change of residence; but jurisdiction cannot be held to have vested prior to action brought. There have been many decisions to this effect, the same question being presented under all the acts from 1789."

Opinion of the Supreme Court by Mr. Chief Justice Fuller in *Emshcimer* v. *New Orleans*, 186 U. S., at p. 44.

See also *Gibson* v. *Bruce*, 108 U. S., 561.

In *Continental Insurance Company* v. *Rhoads* (decided November 29, 1886), 119 U. S., 237, Mr. Chief Justice Waite, in delivering the opinion of the Court, said:

"One of the errors assigned on this record is that the circuit court had no jurisdiction. It was settled at a very early day that the facts on which the jurisdiction of the circuit courts rest must, in some form, appear on the face of the record of all suits prosecuted before them (*Turner* v. *Bank of North America*, 4 Dall., 8; *Bushnell* v. *Kennedy*, 9 Wall., 387; *Hornthall* v. *Collector*, 9 Wall., 560; *Ex parte Smith*, 94 U. S., 455; *Robertson* v. *Cease*, 97 U. S., 646; *Grace* v. *American Central Ins. Co.*, 109 U. S., 278, 283; *Börs* v. *Preston*, 111 U. S., 252, 255; *Mansfield, Coldwater and Lake Michigan Railway* v. *Swan*, 111 U. S., 379, 382; *Hancock* v. *Holbrook*, 112 U. S., 229). And it is error for a court to proceed without its jurisdiction is shown (*Grace* v. *American Central Insurance Co.*, *supra*; *Thayer* v. *Life Association*, 112 U. S., 717; *Mansfield*, &c., *Railway* v. *Swan*, *supra*).

It is conceded that the jurisdiction in this case depends alone on the citizenship of the parties, and that there is not in the declaration any averment in express terms of the citizenship of the plaintiff.

It does appear that the defendant was, at the commencement of the suit, a citizen of Connecticut, and that the intestate, Maris Rhoads, was at the time of his death a citizen of Pennsylvania, but there is nothing to show the citizenship of the plaintiff, and the jurisdiction depends on her citizenship, and not on that of her intestate. *Amory* v. *Amory*, 95 U. S., 186. It is true that the record does show that letters of administration were granted to her in Pennsylvania, but that does not make her a citizen of that State. It may be that by the law of Pennsylvania the personal representative of a deceased citizen of Pennsylvania is, in contemplation of law, resident within the State,

and at all times amenable to the jurisdiction of the proper courts of that State, but that does not necessarily imply citizenship of the State. He must be there for the purposes of his administration, but that is all.

And, besides, the jurisdiction must appear positively. It is not enough that it may be inferred argumentatively (*Brown* v. *Keene*, 8 Pet., 112; *Robertson* v. *Cease*, *supra*). If the plaintiff was actually a citizen of Pennsylvania when the suit was begun, the record cannot be amended here so as to show that fact, but the Court below may, in its discretion, allow it to be done when the case gets back. *Morgan* v. *Gay*, 19 Wall., 81; *Robertson* v. *Cease*, *supra*."

Idem., pp. 239–240.

In the case of *Peper* v. *Fordyce*, 119 U. S., page 471, it was held that "*if the jurisdiction does not appear on the face of the record in some form, the decree is erroneous and must be reversed.*"

Here, there is not only an absence of any averment that the plaintiff below, Edwards, is a citizen of Delaware but this fact, on which jurisdiction depends, does not appear on the face of the record, and it cannot be inferred argumentatively—as we note was decided in the *Continental Insurance Co.* v. *Rhoads*.

In *Thayer* v. *Life Association*, 112 U. S., 717, it was held that since the trustee was an indispensable party, his citizenship was material in determining the jurisdiction of the Circuit Court; and as that was not averred and did not otherwise affirmatively appear to be such as gave the right of removal, the decree must be reversed.

It is error for the Circuit Court to proceed, unless its jurisdiction be shown.

In *Mansfield, Coldwater & Lake Michigan Railway Company* v. *Swan*, 111 U. S., 379, Mr. Justice Matthews, in delivering the opinion of the Supreme Court of the United States, said:

"According to the decision in *Gibson* v. *Bruce*, 108 U. S., 561, the difference of citizenship on

which the right of removal depends must have existed at the time when the suit was begun, as well as at the time of the removal. And according to the uniform decisions of this Court, the jurisdiction of the Circuit Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record (*Grace* v. *American Central Insurance Company*, 109 U. S., 278, 283; *Robertson* v. *Cease*, 97 U. S., 646). It was error, therefore, in the Circuit Court to assume jurisdiction in the case, and not to remand it on the motion of the plaintiffs below."

Idem, pp. 381-382.

In *Horne* v. *George H. Hammond Company*, 155 U. S., 393, in rendering the opinion of the Court, Mr. Chief Justice Fuller said:

"As the transcript of the record does not show that the Circuit Court had jurisdiction of the suit, which depended upon the citizenship of the parties, and as counsel, upon having their attention called to the matter, have furnished nothing of record which would supply the defect, the judgment must be reversed at the costs of plaintiff in error, and the cause be remanded to the Circuit Court for further proceedings (*Robertson* v. *Cease*, 97 U. S., 646, 649; *Anderson* v. *Watt*, 138 U. S., 694, 702; *Timmons* v. *Elyton Land Co.*, 139 U. S., 378; *Denny* v. *Pironi*, 141 U. S., 121."

In the case of *Interior Construction and Improvement Company* vs. *Gibney*, 160 U. S., p. 219, Mr. Justice Gray, in rendering the opinion of the Court, said:

"The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuiary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the Court, of its own motion, will order the action to be dismissed."

Idem, pp. 239-240.

Fourth Point.

A party cannot, by proceedings in the Circuit Court, waive a question of jurisdiction in that Court, so as to prevent its being raised and passed upon by the Supreme Court of the United States.

In *Mansfield, Coldwater & Lake Michigan Railway Company* v. *Swan* (decided April 21st, 1884), 111 U. S., 379, the third head note reads—

"It is an inflexible rule that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. The language of Mr. Justice Curtis in *Dred Scott Case*, 19 How., 566, cited and adopted."

In rendering the opinion of the Court, Mr. Justice Matthews said:

"It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction. and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron* v. *Van Noorden*, 2 Cranch, 126, decided in 1804, where a judgment was reversed, on the application of the party against

whom it had been rendered in the Circuit Court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he had invoked. This case was cited with approval by Chief Justice Marshall in *Brown* v. *Keene*, 8 Pet., 112.

* * * * * *

"The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case ot which the judicial power of the United States does not extend. The course of the court is, where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist (*Pequignot* v. *The Pennsylvania Railroad Company, 16 How., 104*). It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted (*Cutler* v. *Rae*, 7 How., 729). I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this Court is, *sua sponte*, if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power."

"This is precisely applicable to the present case, for the motion of the plaintiffs below to remand the cause was equivalent to a special plea to the jurisdiction of the court; but the doctrine applies equally in every case where the jurisdiction does not appear from the record."

Idem., pp. 382 and 384.

In *Metcalf* v. *Watertown*, decided December 10, 1888, 128 U. S., at p. 589, Mr. Justice Harlan, in rendering the opinion of the Court, said:

"Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon

the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the Court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the State court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind. *If the City had not answered in the present suit, and judgment by default had been rendered against it, this Court, upon writ of error, would have been compelled to reverse the judgment, upon the ground that the record did not show jurisdiction in the Circuit Court.*"

In *Parker* v. *Omsby*, 141 U. S., 81, the second head note reads:

"A party cannot, by proceedings in the Circuit Court, waive a question of the jurisdiction of that court, so as to prevent its being raised and passed upon here."

Mr. Justice Harlan, in delivering the opinion of the Court, said:

"Did the Court below have jurisdiction of this case? If jurisdiction did not affirmatively appear upon the record, it was error to have rendered a decree, *whether the question of jurisdiction was raised or not in the Court below.* In the exercise of its power, this Court, of its own motion, must deny the jurisdiction of the Courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act (*Mansfield, &c., Railway Co.* v. *Swan*, 111 U. S.,

879, 382; *King Bridge Co.* v. *Otoe County*, 120 U. S., 225, 226; *Cameron* v. *Hodges*, 127 U. S., 322, 325.

* * * * * *

The motion to dismiss the appeal necessarily assumes that it was competent for the appellants by their acts, or by failing to act, to waive the question of the jurisdiction of the Circuit Court. This is an error. We said in *Metcalf* v. *Watertown*, above cited, that whether a Circuit Court of the United States had or had not jurisdiction in a case brought here, upon error or appeal, is a question that this Court must examine and determine, even if the parties forbear to make, or consent that the case be considered upon its merits."

Idem, pp. 83 and 86.

Fifth Point.

The costs should be imposed upon the plaintiff in the Circuit Court, the defendant-in-error, Charles William Edwards, because the fault rests alone on the plaintiff, whose duty it was, in bringing the suit, to make the jurisdiction appear.

In *Halsted* v. *Buster*, 119 U. S., at page 342, Mr. Chief Justice Waite, in delivering the opinion of the Court, said:

"This record does not show that the Circuit Court had jurisdiction of the suit, which depends alone on the citizenship of the parties. In the declaration it is stated that Halsted, the plaintiff, is a citizen of New York, but nothing is said of the citizenship of the defendants. Neither is there anything in the rest of the record to show what their citizenship actually was. For this reason the judgment is reversed, but, as the fault rests alone on the plaintiff, whose duty it was, in bringing the suit, to make the jurisdiction appear, the reversal will be at his cost in this court (*Hancock* v. *Holbrook*, 112 U. S., 229)."

In *Hanrick* v. *Hanrick* (decided April 30, 1894), 153 U. S., at page 198, the Court said:

"Brady having wrongfully removed the case into the Circuit Court, must pay the costs in that court

as well as the costs of the three appeals to this Court. *Mansfield, &c., Railway* v. *Swan*, 111 U. S., 379; *Torrence* v. *Shedd*, and *Tennessee* v. *Union & Planters' Bank*, above cited.

In *Tennessee* v. *Union and Planters' Bank*, 152 U. S., 454, the Court, at page 464, said:

"The costs in each case are to be borne by the party who brought into the Circuit Court of the United States a case not within its jurisdiction *Torrence* v. *Shedd*, 144 U. S., 527; *Martin* v. *Snyder*, 148 U. S., 663."

In *Neel* v. *Pennsylvania Company*, 157 U. S., 153, the record failed to show of what State plaintiff was a citizen.

The Chief Justice stated the case and said:

"On the authority of *Grace* v. *American Central Insurance Co.*, 109 U. S., 278, 283, 284; *Continental Insurance Co.* v. *Rhoads*, 119 U. S. 237, and *Mansfield, Coldwater and Lake Michigan Railway* v. *Swan*, 111 U. S., 379, 388, the judgment of the Circuit Court will be reversed, with instructions to remand the case to the state court, with costs against defendant in error, which must also pay the costs in this court. *Hanrick* v. *Hanrick*, 153 U. S., 192, 198."

Idem, p. 154.

Sixth Point.

It is respectfully submitted that the question certified should be answered in the negative, and should be so certified.

Dated April 18, 1904.

FRANKLIN BARTLETT,

Of Counsel for Plaintiff-in-Error.

21775

Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 239.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Plaintiff in Error,

AGAINST

CHARLES WILLIAM EDWARDS,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

First Point.

The brief of counsel for defendant in error seeks to infer jurisdiction argumentatively from the record.

The brief submitted by Mr. Bayard contains an argument seeking to show that from the testimony of Edwards, the defendant in error, jurisdiction should be inferred.

Counsel argues "We find that Edwards not only had a residence in Delaware, but a home in Delaware, and furthermore openly expressed his intent to return to Delaware as his home. In other words, his domicile is affirmatively established in

Delaware, and his citizenship follows as a legal consequence."

But this is a mere argument, and this Court has explicitly held that jurisdiction cannot be inferred argumentatively. Jurisdiction cannot be inferred argumentatively either from the averments or allegations of the complaint, or from the testimony appearing in the record.

In *Brown* v. *Keene*, 8 Peters, p. 115, Mr. Chief Justice Marshall said:

"The decisions of this Court require, that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

In *Robertson* v. *Cease*, 97 U. S., pp. 649–650, Mr. Justice Harlan said:

"In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or *the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness, in other parts of the record.*"

* * * * *

Here the only fact averred, or appearing from the record, is that Cease was a resident of Illinois; and we are, in effect, asked, in support of the jurisdiction of the court below, to infer argumentatively, from the mere allegation of 'residence,' that, if not an alien, he had a fixed permanent domicile in that State, and was a native or naturalized citizen of the United States, and subject to the jurisdiction thereof. By such argumentative inferences it is contended that we should ascertain the fact, vital to the jurisdiction of the court, of his citizenship in some State other than that in which the suit was brought. We perceive nothing in either the language or policy of the Fourteenth Amendment which requires or justifies us in holding that the bare averment of the residence of the parties is sufficient, *prima facie*, to show jurisdiction."

No fact, which in legal intendment constitutes citizenship, was sworn to by Edwards, the defendant in error.

Edwards testified: "One of the reasons I left the *New Haven Palladium* was it was too far away from home. I lived in Delaware, and I had to go back and forth. My family were over in Delaware."

But there is no difference in meaning between the words "reside" and "live." See the definitions of the word "Live" in Webster's Dictionary, Worcester's Dictionary, and the Century Dictionary. And this Court has decided that "citizenship and residence are not synonymous terms." Mr. Bayard asks this Court to infer jurisdiction, because Edwards said, "One of the reasons I left the *New Haven Palladium* was, it was too far away from home," meaning, it is inferred, that Delaware was his home. But calling a place "*home*" does not imply a fixed, permanent domicile, nor should the use of the word "home form the basis of an argumentative inference that a man is a citizen of the place which he denominates "home." Wherever a man resides or has a residence, there is his home, and Worcester defines "*Live—3. To make one's abiding place or home; to abide; to dwell; to reside.*"

There are thousands of individuals in the United States who are not citizens of the States in which they respectively reside or have a home.

In New York City alone many well-known and conspicuous individuals have homes and fixed permanent homes on the Fifth avenue, and yet are citizens of the State of Rhode Island, and exercise political rights in that State, and pay personal taxes and vote in the City of Newport, Rhode Island.

The use of the word "home" by Edwards has not the peculiar magic asserted by his counsel.

Charles Richardson, one of the greatest of lexicographers, in the Pickering (1839) edition of his great dictionary, defines the word "*home*" as follows:

"*Home.—A. S. Haem*-Ger. *Heim*. Dut. *Heym*. Sw. *Hem*—from the A. S. *Haem-an*. Ger. *Heimen*-coire, cohabitare, to come together, to dwell together.

Wachter calls the Ger. *Heim* communis locus habitandi, a *common* place of dwelling, or a *common* dwelling-place.

A place of coming, assembling, dwelling together; the place where any one dwells or inhabits; habitation, or residence or abode."

The "Century Dictionary" tells us that the word "*Home*" is derived from the Anglo-Saxon *Ham*, a home, dwelling, and the Icelandic *heimr*, an abode, village; *heima*, home.

And the first definition given is "*A dwelling; the residence of a family or household.*"

It, therefore, follows that the word "*home*" is the equivalent of "*residence*" or "*dwelling.*"

A man may actually reside in one place, and have his home or residence there, and yet may have a domicil in another place, for as Story says in his *Conflict of Laws*, § 44:

"In many cases actual residence is not indispensable to retain a domicil, after it is once acquired; but it is retained, *animo solo*, by the mere intention not to change it or to adopt another."

Second Point.

An argumentative inference of jurisdiction is not permitted, because it would open the door to an evasion of the Constitution and laws of the United States.

In *Bernards Township* v. *Stebbins*, 109 U. S., at page 353, Mr. Justice Gray, in delivering the opinion of the Court, said:

"But, in the matter of the jurisdiction of the federal courts, the discrimination between suits

between citizens of the same State and suits between citizens of different States is established by the Constitution and laws of the United States. And it has been the constant effort of Congress and of this Court to prevent this discrimination from being evaded, by bringing into the federal courts controversies between citizens of the same State."

Cited with approval in *Shreveport* v. *Cole*, 129 U. S., p. 44.

Third Point.

The alleged declarations of Edwards, the plaintiff in the action, are not evidence, because facts or acts which in legal intendment constitute citizenship, must be proven and not mere declarations of the party.

Mr. Bayard, in his brief, says:

"There can be no question that the uncontradicted testimony of Edwards shows that *his home was in Delaware;* that *he lived in Delaware;* that *his family was in Delaware;* and that he had to *go back and forth from Delaware*, thus evincing not only the positive declaration as to his domicile, but also the positive declaration that in spite of his peregrinations, he was still *animo manendi* as to his domicile in *Delaware*, and a domiciled citizen of Delaware."

In one of the very cases cited by Mr. Bayard, *Lessee of Butler* v. *Farnsworth*, 4 Washington's Circuit Court Reports, pp. 103–104, Washington, *J.*, in delivering the opinion of the Court, said:

"It is true, that the intention of the party in changing the place of his residence, is a material ingredient in the question of citizenship, as it concerns federal jurisdiction. But this intention is to be collected from the *acts*, and not from the declara-

tions of the party. If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicil, however frequent and public his declarations to the contrary may have been. If, on the other hand, the sincerity of the removal, for the purpose of permanently residing in the state which the person has selected, be not questioned, and his acts correspond with such purpose, the change of domicil is completed, and the law forces upon him the character of a citizen of the state where he has chosen his domicil; although he may have uniformly declared, as it is contended the lessor of the plaintiff has done, that he nevertheless considered himself as continuing a citizen of South Carolina. *It is a conclusion of law upon certain facts, which constitutes him a citizen of the state where he permanently resides; which neither his private intentions, nor his public declarations can alter.* Were it otherwise, a door would be opened for the grossest frauds upon the jurisdiction of the federal courts; since a person in the predicament stated might qualify himself to sue, or disqualify himself from being sued in those courts, by declarations known perhaps only to a few of his friends, though in manifest hostility to open and notorious acts, from which alone the world can judge of his intentions."

Fourth Point.

There is no evidence in the record showing that at the time of the commencement of the action Edwards had a home in Delaware or that he then lived in Delaware, or that his family were then over in Delaware.

The complaint, it is true, avers that "plaintiff is a resident of the State of Delaware," but in his tes-

timony he merely says: "One of the reasons I left the *New Haven Palladium* was it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware."

But there is nothing to show that Edwards commenced the action when he was on the *New Haven Palladium.*

And the diversity of citizenship must exist at the time of the commencement of the action, which is the time of the test.

In *Stevens* v. *Nichols* (decided April 1, 1889), 130 U. S., pp. 231–232, Mr. Justice Harlan, in delivering the opinion of the Court, said:

"2. The case was not removable from the State court, unless it appeared affirmatively in the petition for removal, or elsewhere in the record, *that at the commencement of the action, as well as when the removal was asked,* Stevens and Mirick were citizens of some other State than the one of which the plaintiff was, at those respective dates, a citizen. *Gibson* v. *Bruce*, 108 U. S., 561, 562; *Houston & Texas Central Railway* v. *Shirley*, 111 U. S., 358, 360; *Mansfield, Coldwater, &c., Railway* v. *Swan*, 111 U. S., 379, 381; *Akers* v. *Akers*, 117 U. S., 197.

3. The petition for removal does not allege the citizenship of the parties except at the date when it was filed, and it is not shown elsewhere in the record that Stevens and Mirick were, *at the commencement of the action*, citizens of a State other than the one of which the plaintiff was, at that date, a citizen. The Court, therefore, cannot consider the merits of the case." *Metcalf* v. *Watertown*, 128 U. S., 586; *Morris* v. *Gilmer*, 129 U. S., 315, 325.

In *Jackson* v. *Allen* (decided October 28, 1889), 132 U. S., p. 34, Mr. Chief Justice Fuller, in delivering the opinion of the Court, said:

"It appears from the record that the citizenship of the parties *at the commencement of the actions*, as well as at the time the petitions for removal were filed, was not sufficiently shown, and that therefore

the jurisdiction of the state court was never divested. *Stevens* v. *Nichols*, 130 U. S., 230. This being so, the defect cannot be cured by amendment. *Crehore* v. *Ohio and Mississippi Railroad Co.*, 131 U. S., 240."

Fifth Point.

The decision of this Court in the case of Brown v. *Keene, 8 Peters, 112, is fatal to the argument of the defendant in error.*

In that case Mr. Chief Justice Marshall, in delivering the opinion of the Court, said:

"The petition avers, that the plaintiff, Richard Raynal Keene, is a citizen of the State of Maryland; and that James Brown, the defendant, is a citizen or resident of the State of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles. The petition, then, does not aver positively, that the defendant is a citizen of the state of Louisiana, but in the alternative, that he is a citizen or a resident. Consistently with this averment, he may be either.

The additional words of description, 'holding his fixed and permanent domicil in the parish of St. Charles," do not aid this defective description. A citizen of the United States may become a citizen of that state in which he has a fixed and permanent domicil; but the petition does not aver that the plaintiff is a citizen of the United States. The question is, whether the jurisdiction of the Court is sufficiently shown by these averments."

Idem, 114.

This case, therefore, holds that while *a citizen of the United States may become a citizen of that State* in which he has a fixed and permanent domicil, *a party to an action does not, necessarily, become a citizen of the State* by having such fixed and permanent domicil therein.

The reason of this rule is, that domicil does not depend on citizenship or on presence, for a man may be a citizen of one country, have his domicil in another country, and temporarily reside in a third country.

Having a permanent domicil and residence in the United States is not the equivalent of citizenship.

United States v. *Wong Kim Ark* (decided March 28, 1898), 169 U. S., 649.

There, Mr. Justice Gray, in delivering the opinion of the Court, said:

"The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth *are subjects of the Emperor of China, but have a permanent domicil and residence in the United States,* and are then carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States by virtue of the first clause of the Fourteenth Amendment of the Constitution, 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'"

It should be noted that Edwards does not swear that he had any fixed and permanent domicil in Delaware. He merely calls it his home. It does not appear that he ever *attempted to exercise* any political rights or any rights of citizenship in that State or that he ever did exercise such rights. It does not appear that he ever voted or paid personal taxes within the State of Delaware; and it does not appear that he was not a citizen of the State of New York at the time of the commencement of the action.

In *Brown* v. *Keene*, the averment of the petition that "*James Brown, the defendant, is a citizen or resident of the State of Louisiana, holding his fixed and permanent domicil in the parish of St. Charles,*" was much stronger than the averment in this case

that "*plaintiff is a resident of the State of Delaware.*"

An uncontroverted averment is taken as admitted, and so the averment of the petition that "James Brown, the defendant, is *holding his fixed and permanent domicil in the parish of St. Charles,*" had the same force and effect as though the evidence had disclosed such fact. And if an *admitted* averment of "fixed and permanent domicil" does not prove citizenship of the State in which the party has such fixed and permanent domicil, no testimony of like character, can establish citizenship.

Sixth Point.

The complaint contains no averment that the Sun Printing and Publishing Association is a citizen of the State of New York.

Even in respect to the citizenship of the plaintiff in error the complaint is inartificial and defective, because it fails in this essential averment.

Neither the place of organization nor the principal place of business is an absolute test of citizenship.

In *Union Pacific Railway Company* v. *Harris*, 158 U. S., p. 327, the complaint alleged Harris to be "a citizen of the State of Colorado" and complained of "the Union Pacific Railway Company, defendant, which was heretofore and now is duly chartered and organized under and by virtue of the laws of the United States, and having its principal place of business in the City of Omaha and State of Nebraska, and is now and was at the time and times hereinafter stated a citizen of the State of Nebraska."

The "principal place of business" of a corporation is no test of residence, whether of a corporation or of a natural person—as a person may reside in one State and have his principal or sole place of business in another State.

Guinn v. *Iowa Central R'y Co.*, 14 F., 323.

New York & N. E. R. R. Co. v. *Hyde*, 56 F., 188.

Dated, April 19, 1904.

FRANKLIN BARTLETT,
Of Counsel for Plaintiff in Error.

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APR 15

JAMES H. McKEN

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 239.

THE SUN PRINTING AND PUBLISHING ASSOCIATION

vs.

CHARLES WILLIAM EDWARDS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANT.

THOMAS F. BAYARD,
Attorney for Defendant.

GEO. A. WOLF, WILMINGTON, DEL.

21782

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

THE SUN PRINTING AND PUBLISHING ASSOCIATION

vs.

CHARLES WILLIAM EDWARDS.

No. 239. ON CERTIFICATE.

BRIEF FOR DEFENDANT.

STATEMENT OF FACTS.

The action is for breach of contract of employment. The complaint avers and the answer admits that defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the southern district of New York. The complaint further avers and the answer admits that "plaintiff is a resident of the State of Delaware." Upon the trial the plaintiff testified "I started in the printing business about thirty years ago * * * * * I have been on the New York Tribune, on the World, the Philadelphia Record and the American Press Association. * * * * * * * I had charge of the Morning News, Wilmington, Delaware. * * * In this city (New York) I worked on the New York Tribune, on the Sun, on the World, and in the American Press Association. * * * Just prior to my going to work upon the New York Sun (under the contract in suit) I was the publisher and business manager of the Evening Journal of Wilmington, Delaware, and president of the company. * * * (After my discharge from the employ of the Sun) I finally secured a place with the New Haven Palladium, and I was there a while. * * * One of the reasons I left the New Haven Palladium was it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware." (Certificate Page 1.)

THE QUESTION CERTIFIED.

"HAD THE CIRCUIT COURT JURISDICTION OF THE CONTROVERSY BETWEEN PLAINTIFF AND DEFENDENT."

I.

IF THE DIVERSITY OF CITIZENSHIP AFFIRMATIVELY APPEARS UPON THE RECORD, THE JURISDICTION OF THE CIRCUIT COURT MUST BE AFFIRMED.

The law on this point is well settled by the leading case of Robertson vs. Cease 97 U. S. 646, in which the Court says in relation to *the facts which in legal intendment constitute the citizenship* of the parties in the Circuit Court, "In cases where jurisdiction depends upon the citizenship of the parties, such *citizenship, or the facts which in legal intendment constitute it* should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness in other parts of the Record."

Grace vs. American etc. Insurance Co. 109 U. S. 278.
Peper vs. Fordyce 119 U. S. 469.
Continental Insurance Co. vs. Rhoads, 119 U. S. 237.

II.

IT AFFIRMATIVELY APPEARS UPON THE RECORD THAT THE SUN PRINTING AND PUBLISHING ASSOCIATION IS A CITIZEN OF THE STATE OF NEW YORK IN THE SOUTHERN DISTIRCT OF NEW YORK.

The Complaint avers and the Answer admits that The Sun Printing and Publishing Association is a domestic corporation, duly organized and existing under the laws of the State of New York, having its principal office for the transaction of business in the Southern District of New York. (Certificate page 1.)

The law is now well settled that an affirmative averment that one of the parties is a corporation, duly organized and existing under the laws of a certain State, is a sufficient allegation to establish the citizenship of the party in that State.

Louisville R. R. Co. vs. Letson, 2 Howard 497 (558.)
Marshall vs. B. & O. R. R., 16 Howard 314 (329).
Express Co. vs. Kountze, 8 Wallace 342 (351).
Muller vs. Dows, 94 U. S. 444 (445).
Black's Dillon on Removal of Causes, Sec. 178.
Foster's Federal Practice, Sec. 19, Page 67 (3rd. Ed.)

III.

IT AFFIRMATIVELY APPEARS UPON THE RECORD THAT CHARLES WILLIAM EDWARDS IS A CITIZEN OF THE STATE OF DELAWARE.

The Complaint avers and the Answer admits that Edward is a *resident of the State of Delaware.* (Certificate page 1.)

The positive and uncontradicted testimony of Edwards shows that just prior to entering into the contract (the breach of which caused this action) he was the publisher and manager of a newspaper in *Wilmington, Delaware,* and President of the Company; that after his discharge by the Sun Printing and Publishing Association, he obtained a place on the New Haven Palladium, which last position he left, giving as a reason *that it was too far away from his home,* that *he lived in Delaware,* and had to go back and forth, and that *his family were over in Delaware.* (Certificate Page 1.)

a.

Edwards was a citizen of the State of Delaware.

In the case of Poppenhauser vs. India Rubber Company 14 Fed. Rep. 707, the Court says, "For the purpose of jurisdiction of the Courts of the United States, *domicile is the test of citizenship.*"

Carter on Jurisdiction of Federal Courts, (Page 18), says: "But in considering who are citizens of a State for the purposes of jurisdiction of Federal Courts, the only question is as to the *intent to have a home or fixed residence there. State citizenship follows domicile as an operation of law*, and whatever wishes or intentions a party may have as to claiming citizenship in a given State, it is determined by law, and follows his domicile irrespective of his wishes, * * *. *If his domicile be established, citizenship in the State of such domicile follows as a legal consequence.*"

Applying the facts as affirmatively shown on the record to the two citations just made we find that Edwards not only had *a residence in Delaware, but a home in Delaware*, and furthermore *openly expressed his intent to return to Delaware as his home.* In other words, his domicile is affirmatively established in Delaware, and his citizenship follows as a legal consequence.

Story in his Conflict of Laws Sec. 44. says, that *two things* must concur to constitute *domicile.* "First: residence. Secondly: the intention of making it the home of the party."

Wharton in his Conflict of Laws section 21, (Sec. Ed.) says, "*Domicile is a residence acquired as a final abode.* To constitute it there must be: (1) residence, actual or inchoate; (2) the non-existence of any intention to make a domicile elsewhere."

There can be no question as to the law as thus laid down by Story and Wharton, and as adopted by the United States Supreme Court in Mitchell vs. United States, 21 Wallace. 350, wherein Swayne J. says (352), "*Domicile* has thus been defined: "*A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.*" This definition is approved by Philmore in his work on the subject. By the term domicile, in its ordinary acceptation is meant the place where a person lives and has his home. *The place where a person lives is taken to be his domicile until facts adduced establish the contrary.*"

Again quoting from Carter on Jurisdiction of Federal Courts, (page 18), "*Test of Citizenship*—It may be therefore laid down that for the *purpose of jurisdiction of Federal Courts* a citizen of the United States residing permanently—i.e. *with the present intention of remaining —in any State as a citizen of that State* * * *. Domicile implies more than mere residence. Primarily a person's domicile is his legal home or a place where the law will presume he intends to permanently reside although he may be absent from it at the time."

In Anderson vs. Watt, 138 U. S. 694 Waite, C. J. says (706), "*The place where a person lives is taken to be his domicile until facts adduced establish the contrary*, and a domicile when acquired is presumed to continue until it is shown to have been changed."

In the case of Rucker vs. Bolles, 80 Fed. 504. Thayer J. (508) says, "It is his *intention to make* the place * * * *his permanent* place of *domicile* which *determines whether he has become, a citizen of that State* * * *. As general rule, a person's intentions in that respect can be ascertained in no other way than by his declarations * * *."

There can be no question that the uncontradicted testimony of Edwards shows that *his home was in Delaware;* that *he lived* in *Delaware;* that *his family was in Delaware*; and that he had to *go back and forth from Delaware*, thus evincing not only the positive declaration as to his domicile, but also the positive declaration that in spite of his peregrinations, he was still *animo manendi* as to his domicile in *Delaware*, and a domiciled citizen of Delaware.

Again quoting from Carter on Jurisdiction of Federal Courts, (Page 19), "The distinction between domicile and mere residence may be shortly put as that between residence *animo manendi* and residence *animo revertendi*. Mere residence may be for a transient purpose, as for business, for a fixed period, or limited by an expected future event, upon the happening of which there is a purpose to return or remove."

In Marks vs. Marks, 75 Fed. Rep. 321, the Court says (324), "*Citizenship in relation to the federal judiciary*, must be of that kind which identifies the party with some particular State of which he is a member. Butler vs. Farnsworth, 4 Wash. C. C. 101, Morris vs. Gilmer, 129 U. S. 315, Mitchell vs. U. S., 21 Wallace 350. *To constitute citizenship of a State in relation to the Judiciary Acts requires: First, residence within such State; and, second: an intention that such residence shall be permanent. In this sense State citizenship means the same thing as domicile in its general acceptation.* The act of residence does not alone constitute the domicile of a party, *but it is the fact of residence, accompanied by an intention of remaining which constitutes domicile.* The distinction between *domicile* and *mere residence* may be shortly put as that between residence *animo manendi* and residence *animo revertendi* * * * *. The two elements of residence, and the intention that such residence shall be permanent, must concur to make citizenship."

See also Carter on Jurisdiction of Federal Courts, (page 20), "It is a conclusion of Law upon certain facts which constitutes him a citizen of the State where he permanently resides."

It is respectfully submitted that the law in the cases hereinabove quoted when applied to the facts testified to by Edwards *affirmatively shows that he was a citizen of the State of Delaware*, and as such a citizen clothed with all the rights flowing from such a status. In other words, that as a resident in Delaware, with his home in Delaware, and with the animus manendi Edwards was a citizen of the State of Delaware, and therefore fully qualified to avail himself of the jurisdiction of the United States Circuit Court for the Southern District of New York in bringing this suit.

b.

Edwards was not a citizen of the State of New York in that he was a citizen of the State of Delaware.

While it no where, even by suggestion, appears upon the record that Edwards was a resident, much less a citizen of the State of New York, yet grant, for the sake

of argument, that he had been both a resident and a citizen of the State of New York at some time prior to his entering into the employ of the Sun Printing and Publishing Association. Then his right to bring suit in the Circuit Court would be, among other things, predicated upon his *being a citizen* of some other State than New York, and his removal to another State, *even though for the sole purpose of bringing suit*, would enable him to go into the Circuit Court, if he could, as he has so patently done in this cause, *show that he was domiciled in Delaware*, or any State other than New York.

In speaking of the determination of citizenship by acquiring residence in a State, the Court says in Butler vs. Farnsworth, 4 Wash. C. C. 101 (104), "If, on the other hand, *the sincerity of the removal, for the purpose of permanently residing in the State which the person has selected, be not questioned, and his acts correspond with such purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the State where he has chosen his domicile.* * * * * *It is a conclusion of law upon certain facts, which constitutes him a citizen of the State where he permanently resides.*"

In the case of Cooper vs. Galbraith 3 Wash. C. C. 546, the Court says (553), "But to give jurisdiction to the Courts of the United States the suit must be between citizens residing in different States. * * * *If a citizen of one State should think proper to change his domicile, and to remove himself and family, if he have one, into another State, with a bona fide intention of abandoning his former place of residence, and to become an inhabitant or resident of the State to which he removes; he becomes, immediataly upon such removal, accompanied with such intention, a resident citizen of that State, and may maintain an action in the Circuit Court of the State which he has abandoned, or in that of any other State, except the one in which he has settled himself.*"

This last case is quoted with approval in Dickerman vs. Trust Company, 176 U. S. 181, where the Court in

referring to it says, (192), "The law is equally well settled that, if a person take up a ***bona fide residence in another State, he may sue in the Federal Court,*** notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the State in which the Court was held."

Jacobs in his Treatise on the law of Domicile says (section 134), "When the transfer of bodily presence has been accomplished the *factum* is complete; and generally speaking, no further act is necessary, but domicile vests immediately, provided the requisite animus be present. ***Uno solo die constitutur domicilium si de voluntate appereat***—says D'Argentre; and Grotius puts it still more strongly:—***uno momento domicilium constitutum intelligitur.***"

In Winn vs. Gilmer 27 Fed. 817, Turner J. says (817), "'citizenship,' as used in the law under consideration, ***means residence with the intention of remaining permanently at that place.*** A man may reside in a State for an indefinite period of time without becoming a citizen, but the moment a man takes up his residence in a State different from that where he formerly was domiciled or was a citizen, with the intent or purpose of making the new place of residence his future permanent home, that moment, he loses his former domicile, and becomes domicled in the new place; ***or, in other words, he ceases to be a citizen of the former place of residence, and becomes a citizen of the State of his adoption.***"

Story's Conflict of Laws, Sec. 47. 48.
Wharton's Conflict of Laws, Sec. 58.

Applying the last seven citations to the supposition as to prior residence in New York, coupled with Edwards' positive testimony as to his domicile, animo manendi, in Delaware, there can be no question as to his citizenship in Delaware being a proper ground for bringing this action.

Again, to approach the question from another point of view, Dicey in his Treatise on The Conflict of Laws

in Chapter II. Rule 2, says—"No person can at any time be without a domicile. * * * * * It is a settled rule that no man shall be without a domicile. (quoting Udny vs. Udny, L. R. 1 Sc. App. 441, and Bell vs. Kennedy, ibid. 307). * * * * The principle here laid down is in effect, that for the purpose of determining a person's legal rights or disabilities, the Courts will invariably hold that there is some Country in which he has a home and will not admit the possibility of his being in fact homeless, or in other words, even if he is in fact homeless, a *home will, for the purpose of determining his legal rights or those of other persons, always be assigned to him by a presumption or fiction of law.*"

See also Guier vs. O'Daniel, 1 Binney (Pa.) 350.

Bluntschli, National Law Codified, Sec. 394 says: "Some persons may in rare instances be under the jurisdiction of two different States. *In case of conflict, the preference will be given to the State in which the individual or family in qestion have their domicile.*

If these last citations be applied to the facts as they appear on the Record in this cause, the uncontradicted statements of Edwards are binding upon the Court, and he is shown *affirmatively* to be a domiciled citizen of State of Delaware, and not of New York.

IV.

THE JURISDICTION OF THE CIRCUIT COURT SHOULD BE AFFIRMED.

It is respectfully submitted that the foregoing statement of fact and law conclusively proves the right of the Circuit Court to entertain jurisdiction in this case.

THOMAS F. BAYARD,

Attorney for Defendant.

Supreme Court of the United States.

No. 239.—October Term, 1903.

The Sun Printing and Publishing Association, Plaintiff in Error, vs. Charles William Edwards. | On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

[May 16, 1904.]

Mr. Justice White delivered the opinion of the Court.

The certificate of the United States Circuit Court of Appeals for the Second Circuit is as follows:

"This cause comes here upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. Upon examination of the record it appears that, in addition to various questions as to the merits of the controversy which are presented by the assignments of error, the jurisdiction of the Circuit Court is in issue. Under sections 5 and 6 of the act of March 3, 1891, writs of errors in such cases are to be taken direct to the Supreme Court, and the grant of appellate jurisdiction to the Circuit Courts of Appeal does not include such cases.

"In accordance therefore, with the practice indicated in *Cincinnati, Hamilton & D. Co.* v. *Thiebaud*, (177 U. S. 615,) and *Am. Sugar Co.* v. *New Orleans*, (181 U. S. 277,) and followed by this court in *United States* v. *Lee Yen Tai*, (113 Fed. Rep. 465,) this court elects to reserve judgment upon the other questions and to certify the question of jurisdiction to the Supreme Court.

Statement of Facts.

"The facts out of which the question of jurisdiction arises are as follows:

"The action is for breach of contract of employment. The complaint avers and the answer admits that defendant is a domestic corporation, duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Southern District of New York. The complaint further avers and the answer admits that 'plaintiff is a resident of the State of Delaware.' Upon the trial the plaintiff testified: 'I started in the printing business about thirty years ago. . . . I have been on the New York Tribune, on the World, the Philadelphia Record and the American Press Association. . . . I had charge of the Morning News, Wilmington, Delaware. . . . In this city [New York] I worked on the New York Tribune, on the Sun, on the World, and in the American Press Association. . . . Just prior to my going

to work upon the New York Sun [under the contract in suit] I was the publisher and business manager of the Evening Journal of Wilmington, Delaware, and president of the company. . . . [After my discharge from the employ of the Sun] I finally secured a place with the New Haven Palladium, and I was there a while. . . . One of the reasons I left the New Haven Palladium was that it was too far away from home. I lived in Delaware and I had to go back and forth. My family were over in Delaware.'

"There was no other testimony in any way bearing upon plaintiff's residence or citizenship.

"The jurisdiction of the Circuit Court was not questioned by the defendant in the court below, and the assignments of error do not present any such question.

Question Certified.

"Upon the facts above set forth, the question of law concerning which this court desires the instruction of the Supreme Court is:

"'Had the Circuit Court jurisdiction of the controversy between plaintiff and defendant?'

"In accordance with the provisions of section 6 of the act of March 31, 1891, establishing Courts of Appeal, &c., the foregoing question of law is by the Circuit Court of Appeals for the Second Circuit hereby certified to the Supreme Court."

In the argument at bar on behalf of the Sun Printing and Publishing Association, the plaintiff in error in the Circuit Court of Appeals, the jurisdiction of the Circuit Court over the controversy was denied, not only upon the hypothesis that Edwards, the plaintiff, was not alleged or shown to have been a citizen of Delaware, but also upon the assumption that the Sun Association was not averred to have been a citizen of New York. The latter contention may be at once dismissed from view, because the allegation of the complaint, admitted by the answer, "that defendant is a domestic corporation, duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Southern District of New York," clearly imported that the corporation was originally created by the State of New York. The presumption necessarily followed that the corporation was composed of citizens of that State, and consequently the corporation was entitled to sue or be sued in the courts of the United States as a citizen of New York. (*Southern R. R. Co.* v. *Allison*, 190 U. S. 326.)

We come to the contention that the citizenship of Edwards was not averred in the complaint or shown by the record, and hence jurisdiction did not appear.

In answering the question, whether the Circuit Court had jurisdiction of the controversy, we must put ourselves in the place of the Circuit Court of Appeals, and decide the question with reference to the transcript of record in that court.

Had the transcript shown nothing more as to the status of Edwards than the averment of the complaint that he was a "resident of the State of Delaware," as such an averment would not necessarily have imported that Edwards was a citizen of Delaware, a negative answer would have been impelled by prior decisions. (*Mexican Central Ry. Co.* v. *Duthe*, 189 U. S. 76; *Horne* v. *George H. Hammond Co.*, 155 U. S. 393; *Denny* v. *Pironi*, 141 U. S. 121; *Robertson* v. *Cease*, 97 U. S. 646.) The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient. (*Horne* v. *George H. Hammond Co.*, *supra*, and cases cited.)

As this is an action at law, we are bound to assume that the testimony of the plaintiff contained in the certificate of the Circuit Court of Appeals, and recited to have been given on the trial, was preserved in a bill of exceptions, which formed part of the transcript of record filed in the Circuit Court of Appeals. Being a part of the record, and proper to be resorted to in settling a question of the character of that now under consideration, (*Robertson* v. *Cease*, 97 U. S. 648,) we come to ascertain what is established by the uncontradicted evidence referred to.

In the first place, it shows that Edwards, prior to his employment on the New York Sun and the New Haven Palladium, was legally domiciled in the State of Delaware. Next, it demonstrates that he had no intention to abandon such domicil, for he testified under oath as follows: "One of the reasons I left the New Haven Palladium was, it was too far away from home. I lived in Delaware, and I had to go back and forth. My family are over in Delaware." Now, it is elementary that, to effect a change of one's legal domicil, two things are indispensable: First, residence in a new domicil; and, second, the intention to remain there. The change cannot be made, except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. (*Mitchell* v. *United States*, 21 Wall. 353.)

As Delaware must, then, be held to have been the legal domicil of Edwards at the time he commenced this action, had it appeared that he was a citizen of the United States, it would have resulted, by operation of the Fourteenth Amendment, that Edwards was also a citizen of the State of Delaware. (*Anderson* v. *Watt*, 138 U. S. 702.) Be this as it may, however, Delaware being the legal domicil of Edwards, it was impossible for him to have been a citizen of another State, District or Territory; and he must then have been either a citizen of Delaware or a citizen or subject of a

foreign state. In either of these contingencies, the Circuit Court would have had jurisdiction over the controversy. But, in the light of the testimony, we are satisfied that the averment in the complaint, that Edwards was a resident "of" the *State* of Delaware, was intended to mean, and, reasonably construed, must be interpreted as averring, that the plaintiff was a *citizen* of the State of Delaware. (*Jones* v. *Andrews*, 10 Wall. 331; *United States Express Co.* v. *Kountze*, 8 Ib. 342.)

The question is answered in the affirmative, and it will be so certified.

Mr. Justice HARLAN and Mr. Justice PECKHAM dissenting.

True copy.

Test:

Clerk Supreme Court, U. S.